

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,) No. CR19-159-RSL
Plaintiff,)
v.) PAIGE THOMPSON'S PARTIAL
PAIGE A. THOMPSON,) OPPOSITION TO THE
Defendant.) GOVERNMENT'S MOTION FOR
) ENTRY OF A COMBINED
) PRELIMINARY ORDER OF
) FORFEITURE AND POSITION ON
) RESTITUTION
)

I. INTRODUCTION

Paige Thompson opposes the government's forfeiture and restitution requests.

The government's arguments and positions are flawed and should not be adopted by the Court.

Although Ms. Thompson has no opposition to forfeiting computers that were seized from her house on the day of her arrest, she objects to forfeiting the \$10,014 the government claims is tied to her. The government has failed to prove those funds belong to her, were received by her, or have any nexus whatsoever to the crimes with which she was convicted, and which is unreasonably calculated on the basis of historic prices of Ethereum (“ETH”) at unknown dates and times as opposed to the present-day value of the ETH, which is only \$1,165.67 as of the date of this filing. Because the government has failed to establish the requisite nexus by a preponderance of the evidence, the Court should enter an order of forfeiture only as to her computer equipment, or what the government identifies as Subject Property 2 and Subject

1 Property 3, and deny the government's request for an order of forfeiture as to Subject
 2 Property 1.

3 Ms. Thompson recognizes that an order of restitution under the Mandatory
 4 Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C. § 3663A, is required here, but
 5 the government has not proven the amount of restitution by a preponderance of the
 6 evidence. The manner in which the evidence was submitted before the Court makes it
 7 impossible to parse out which amounts Capital One incurred as a direct and foreseeable
 8 result of the crimes of conviction and which it incurred as a result of the regulatory
 9 investigation and findings by the Office of the Comptroller of the Currency ("OCC") or
 10 the class action civil litigation. Only the former is an appropriate restitution award
 11 under the MVRA. Further, to the extent the Court finds that the government has
 12 substantiated any restitution amounts, Ms. Thompson lacks the ability to pay any of the
 13 costs the government seeks and requests that the Court impose, at most, a nominal
 14 payment obligation only as to the direct remediation costs Capital One suffered as a
 15 result of her actions which, at best, total only \$545,000 out of the hundreds of millions
 16 the government seeks.

17 **II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

18 On October 3, 2022, the government filed a motion for entry of a combined
 19 preliminary order of forfeiture, which moved to forfeit the following property:

- 20 1) A sum of money in the amount of approximately \$10,014.00 (Subject
 21 Property 1);
- 22 2) A Dell laptop S/N JKQKJM2 with power cord (Subject Property 2); and
- 23 3) A white, custom-built desktop computer (Subject Property 3).

24 Dkt. 383 at 2–3. In moving for forfeiture, the government claimed that Subject
 25 Property 1 represented proceeds obtained from Ms. Thompson's wire fraud scheme
 26 (Count 1) and her violation of the Computer Fraud and Abuse Act ("CFAA"), 18

1 U.S.C. § 1030(a)(5)(A) and (c)(4)(B)(i) (Count 8). *Id.* at 1–2. As to Subject Property 2
 2 and Subject Property 3, the government claimed these computer systems were “used or
 3 intended to be used to commit or to facilitate” the CFAA violations located at Counts 2
 4 and 4 through 8. *Id.* at 2.

5 **III. ARGUMENT**

6 The Court should order forfeiture of Ms. Thompson’s computers, but not money
 7 that the government cannot sufficiently link to Ms. Thompson or her offenses. Where
 8 the government seeks forfeiture of “specific property, the court must determine whether
 9 the government has established the requisite nexus between the property and the
 10 offense.” Fed. R. Crim. P. 32.2(b)(1)(A). Similarly, if the government “seeks a personal
 11 money judgment, the court must determine the amount of money that the defendant will
 12 be ordered to pay.” *Id.* The Court’s determination “may be based on evidence already in
 13 the record” and “on any additional evidence or information submitted by the parties and
 14 accepted by the court as *relevant* and *reliableId.* at 32.2(b)(1)(B) (emphasis added).
 15 A “preponderance of the evidence standard” applies to such proceedings. *See United*
 16 *States v. Haleamau*, 887 F. Supp. 2d 1051, 1054 (D. Haw. Aug. 1, 2012) (*citing United*
 17 *States v. Howard*, 894 F.2d 1085, 1090 (9th Cir. 1990)). Further, criminal forfeiture is
 18 an *in personam* action in which only the defendant’s interest in property may be
 19 forfeited. *United States v. Riley*, 78 F.3d 367 (8th Cir. 1996).

20 While the government provided the Court with evidence that Subject Property 2
 21 and Subject Property 3 were both seized from Ms. Thompson’s bedroom and had
 22 evidence related to the CFAA violations described in Counts 2 and 4 through 8,
 23 Dkt. 383 at 7, the government did not provide such evidence to the Court regarding
 24 Subject Property 1. Instead, the government supplied evidence that there were
 25 “cryptomining computer scripts located on Thompson’s computers” that “were
 26 designed to deposit cryptojacking proceeds into a specific cryptocurrency wallet” and

1 that the total amount of “deposits into the wallet . . . was \$10,014.03.” *Id.* at 4.
 2 However, there are many inconsistencies with the government’s evidence as to Subject
 3 Property 1.

4 First, the government seeks to forfeit Subject Property 1 pursuant to Counts 1
 5 and 8, but Count 1 only alleges activity through July 17, 2019, and a look at the
 6 cryptocurrency wallet “0x5a86a6ff21aac657ca820e24518f0 65b915ea74f” clearly
 7 indicates activity that took place *after* July 17, 2019. *See* Blockchain.com, *available at*
 8 <https://www.blockchain.com/eth/address/0x5a86a6ff21 aac657ca820e24518f065b915 ea74f?view=standard>. To the extent the government is moving to forfeit these funds on
 10 the basis of Count 1, it could only move to forfeit funds received up until July 17, 2019,
 11 which was the end period identified in the Indictment for the crime of wire fraud.
 12 Dkt. 166 at 1. The government has provided no evidence of what funds were received
 13 prior to July 17, 2019, nor what funds were provided after such date. Indeed, the
 14 exhibits to which the government cites are generally without any dates whatsoever. *See,*
 15 *e.g.*, Gov’t Ex. 855. The government has thus not established the requisite nexus
 16 between Subject Property 1 and Count 1 of the guilty verdict with relevant and reliable
 17 evidence beyond a preponderance of the evidence.

18 Second, the government has never established that Ms. Thompson owned,
 19 controlled, or benefitted in any way from that cryptocurrency wallet. Indeed, the
 20 government never seized the funds in that cryptocurrency wallet as part of any of the
 21 proceedings in this matter to date. The government offers the Court no trace of those
 22 funds from the identified cryptocurrency wallet to Ms. Thompson’s bank accounts,
 23 purchases, or even another cryptocurrency wallet that could be identified as hers.

24 Third, the government’s claim that the amount of money in the account was
 25 consistent with her statements “regarding the amount of money she was making
 26 through cryptojacking” is just wrong. The wallet has relevant activity between April 7,

1 2019, and August 4, 2019, which is a period of roughly four months. *See id.* Thus, if
 2 Ms. Thompson's braggadocio is to be considered corroboration, as the government
 3 claims it is (*see* Dkt. 383 at 4–5), the amount in the identified wallet should be \$20,000,
 4 not \$10,014.03 as the government claims.

5 Lastly, the government provides no argument or evidence for why the amount
 6 forfeited should be \$10,014.03 as opposed to the present-day value of the total amount
 7 of cryptocurrency ever deposited in the identified wallet, 55.27738 ETH, which is only
 8 \$1,165.67 in USD. *Compare* Govt' Ex. 855 with Blockchain.com, *available at*

9 <https://www.blockchain.com/eth/address/0x5a86a6ff21aac657ca820e24518f065b915ea74f?view=standard>. It is unknown how the government arrived at its total of

10 \$10,014.03 in total funds to be forfeited as the government did not provide the Court
 11 with evidence of the exact ETH valuations it used to derive that number.

12 Cryptocurrency is an asset that fluctuates in value second-to-second and the
 13 government has provided the Court with no evidence as to why its supposed valuation
 14 of the 55.27738 ETH (which appears to be based on historic ETH prices according to
 15 Gov't Ex. 855) controls. Indeed, the government has not provided any information
 16 about what sources it utilized to substantiate its historic ETH price, at what point in
 17 time it pegged the price (there can be a wide gap between any given 24-hour high and
 18 low amount), and why historic prices should be used in lieu of current dollar value.

19 The government has failed to establish the requisite nexus between Subject
 20 Property 1 and the offenses committed by Ms. Thompson by a preponderance of the
 21 evidence. As such, the Court should enter an order forfeiting Subject Property 2 and
 22 Subject Property 3, but not Subject Property 1. The government has failed to establish
 23 that Ms. Thompson had any control or custody over the identified wallet (or the funds
 24 therein), nor that she benefited in any way from the funds contained therein. The
 25

1 government has thus failed to establish that over \$10,000 should be forfeited by a
 2 preponderance of the evidence.

3 **IV. MS. THOMPSON'S POSITION ON RESTITUTION**

4 The Court should reject the government's overly expansive restitution request
 5 because it is unsupported by the law and facts and circumstances. While an order of
 6 restitution is mandatory in this case pursuant to the MVRA, the burden of proof to
 7 establish the actual amount of restitution falls on the government. 18 U.S.C. § 3664. As
 8 with forfeiture, the standard is preponderance of the evidence. *Id.*

9 The amount of restitution is limited in at least three ways. First, as restitution is
 10 compensatory, it is limited to the victim's "actual losses." *See, e.g., United States v.*
 11 *Eyraud*, 809 F.3d 462, 467 (9th Cir. 2015); *United States v. Schurman*, No. 21-CR-
 12 00234-VC-1, 2022 WL 5337746, at *2 (N.D. Cal. Oct. 7, 2022). Restitution "is meant
 13 to make victims whole, not enrich them." *Schurman*, 2022 WL 5337746, at *3. Second,
 14 victims "may only receive restitution for harm directly and proximately caused by the
 15 offense or scheme." *Id.* at *2 (citing 18 U.S.C. § 3663A(a)(2)). The harm "must be the
 16 'direct and foreseeable result'" of the defendant's actions. *Id.* (quoting *United States v.*
 17 *Cummings*, 281 F.3d 1046, 1052 (9th Cir. 2002)). Third, the Court's restitution order is
 18 limited to the MVRA's method of calculating losses. *Id.* (citing 18 U.S.C. § 3663A(b)).

19 Where the offenses result in damage to property, the amount of restitution is
 20 generally calculated by taking the value of the property (either on the date of the
 21 damage or the date of sentencing) and subtracting the value of any property returned.
 22 *See id.* However, where the government alleges that property was rendered temporarily
 23 unusable or only partially damaged, the Court may calculate the damage by "using the
 24 costs incurred in responding to or cleaning up from a crime." *Id.* Orders of restitution
 25 under the MVRA should *not* include costs incurred in responding to civil or regulatory
 26 investigations, *see Lagos v. United States*, 138 S. Ct. 1684, 1688 (2018), and courts

1 should be wary of self-serving affidavits filed by victims without reference to
 2 independent valuations of remediation services. *See Schurman*, 2022 WL 5337746, at
 3 *2 (rejecting individual's attempt to set restitution amount as his own cost to do the
 4 remediation work).

5 Here, the only victim for which the government seeks restitution is Capital One,
 6 and the only evidence upon which they rely is a self-serving affidavit by Capital One's
 7 Senior Director of Enterprise Technology and Digital Finance, David Watts. Mr.
 8 Watts's affidavit outlines the following costs:

- 9 • \$120,000 to hire a cyber forensics firm to determine the “root cause of the
 10 Hack and validate Capital One's remediation efforts”;
- 11 • \$2.7 million in “technology costs” related to “additional storage of
 12 relevant log data and remediation of Capital One's” AWS buckets;
- 13 • \$425,000 to hire a third-party forensic firm “to confirm the number of
 14 impacted individuals”;
- 15 • \$2.5 million for “notifying impacted individuals”;
- 16 • \$5 million “to establish a dedicated number for impacted or potentially
 17 impacted individuals to use, to hire additional call center staff . . . and to
 18 pay overtime to existing call center agents to handle increased call
 19 volume”;
- 20 • \$30 million for “offering impacted individuals free credit monitoring”;
 21 and
- 22 • \$190 million settlement in a class action civil lawsuit.

23 Watts Aff. at 2–3. In support of his affidavit, Mr. Watts provided only a single invoice,
 24 a \$30 million invoice from TransUnion for “July Breach Services.” *Id.* at Ex. A. The
 25 government's presentation of evidence in support of restitution suffers from multiple
 26 flaws, including that it requests restitution for costs that are not reimbursable under the

1 MVRA, were not direct and foreseeable results of Ms. Thompson’s actions, or that are
 2 not proven by a preponderance of the evidence.

3 First, the \$190 million civil settlement that Capital One (and AWS, who is not
 4 listed as a victim here) negotiated with private individuals in a civil lawsuit years after
 5 the events that underlie Ms. Thompson’s conviction is not an “actual loss” that is
 6 compensable via a MVRA restitution order. *See Lagos*, 138 S. Ct. at 1688. Even if it
 7 were, by the government’s own admission, the legal claims at issue in the civil lawsuit
 8 were “distinct from those in the indictment” filed against Ms. Thompson. Dkt. 313 at 7.
 9 Thus, the government cannot prove that the \$190 million civil settlement was “directly
 10 and proximately caused by” Ms. Thompson’s “offense or scheme” as is required by 18
 11 U.S.C. § 3663A(a)(2). The Court should thus not order this amount as restitution.

12 Second, as to the \$30 million spent in free credit monitoring, the \$5 million in
 13 “call center” expenses, and the \$2.5 million in “notifying impacted individuals,” none
 14 of these expenses were the “direct and foreseeable result” of Ms. Thompson’s actions.
 15 *Schurman*, 2022 WL 5337746, at *3. The manner in which Ms. Thompson accessed
 16 Capital One’s data meant that she had no idea what she took—or how much of it—until
 17 well after the fact, and the evidence was clear that once she knew that she had PII, she
 18 did nothing to monetize or otherwise release it publicly. The evidence was also clear
 19 that because of the manner in which Capital One stored the data, the “parquet” format,
 20 Ms. Thompson had access to very little actionable PII. The government can thus not
 21 prove by a preponderance of the evidence that these costs were directly related to
 22 Ms. Thompson’s actions nor reasonably foreseeable by her.

23 Third, the expenses related to the free credit monitoring, the “call center,” the
 24 \$2.5 million in notification expenditures, and the \$2.7 million in “technology costs” are
 25 also woefully vague and unsupported by any actual evidence (outside of a singular
 26 TransUnion invoice without much information as to how the \$30 million was calculated

1 or for what). It is thus unclear if these costs were incurred by Capital One as a result of
 2 responding to and remediating Ms. Thompson's actions or whether they were incurred
 3 as a result of Capital One's civil litigation or in response to the Consent Decree by the
 4 OCC. Indeed, with respect to the \$2.7 million in "technology costs," it is unclear what
 5 time period these costs covered and whether they were incurred at the request of the
 6 prosecution, the OCC, or private civil litigants. The Court should thus not order these
 7 amounts as restitution.

8 This leaves the only potential restitution to be awarded here as the \$120,000 to
 9 hire an outside firm to determine the "root cause of the Hack and validate Capital One's
 10 remediation efforts" and the \$425,000 to hire a third-party forensics firm to "confirm
 11 the number of impacted individuals." However, the government has not provided the
 12 Court with any actual evidence of these amounts in the form of invoices or letters from
 13 the outside firms, confirming the costs and the date on which they were incurred. This
 14 is particularly necessary for the \$425,000 to hire a third-party forensic firm as it is
 15 unclear whether that firm was hired by Capital One in response to Ms. Thompson's
 16 actions or hired far later in response to the OCC investigation or the class action civil
 17 lawsuit. The timing of these events matters under the MVRA, and the government's
 18 inability to provide basic evidence about the amounts incurred, the scope of the services
 19 provided, and on what dates fails to provide evidence beyond a preponderance of the
 20 evidence.

21 In any event, as the Court is well aware, Ms. Thompson has little to no ability to
 22 pay *any* amounts of restitution, let alone the multiple millions of dollars that Capital
 23 One seeks. Although she has been searching for—and applying to—multiple jobs since
 24 her sentencing, she has not yet obtained employment. Thus, to the extent that the Court
 25 finds the government has substantiated any of its claimed restitution amounts,
 26

1 Ms. Thompson could only “make nominal periodic payments” at best. 18 U.S.C.
2 §3664(f)(3)(B).

3 **V. CONCLUSION**

4 For all of the above reasons, Ms. Thompson requests that the Court enter an
5 order forfeiting Subject Property 2 and Subject Property 3, and deny the government’s
6 request to forfeit Subject Property 1. Ms. Thompson also requests that the Court find
7 that the government has not proven Capital One’s restitution amounts by a
8 preponderance of the evidence or, in the alternative, that it order Ms. Thompson to pay
9 nominal payments solely as to the actual costs to remediate the damage caused by the
10 crimes of conviction, which total—at most—\$545,000.

11 Dated this 23rd day of November 2022.

12 Respectfully submitted,

13 *s/ Mohammad Ali Hamoudi*
14 *s/ Nancy Tenney*
15 Federal Public Defender’s Office

16 *s/ Brian E. Klein*
17 *s/ Melissa A. Meister*
18 *s/ Emily R. Stierwalt*
Waymaker LLP

19 Attorneys for Paige Thompson